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No. 79-1844

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF WASHINGTON, et. al.,

Petitioners,

v.

THURSTON COUNTY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Washington State Supreme Court (Pet. App. pp. A-1 - A-15) is reported at 92 Wash. 2d 656, 601 P.2d 494 (1979).

JURISDICTION

The Department of Natural Resources of the State of Washington, hereinafter referred to as the "Department," failed to cite a jurisdictional basis for its petition. Presumably it is

28 U.S.C. § 1257(3). The petition for certiorari is a companion case to the appeal from the same decision filed sub nom. Lake Lawrence, Inc. v. Thurston County, et al., U. S. Supreme Court No. 79-1880.

QUESTIONS PRESENTED

Whether this Court will grant a new trial on the issue of taking of state managed trust land without compensation, when:

1. No ruling of law, statute or decision of any court prevented the Department from raising the taking issue or presenting argument on the taking issue;

2. The Department fully raised and argued the taking issue below; and

3. The court below fully considered the taking claims in connection with the project denial and ruled that no taking occurred because the permit denial permits other economically useful development of the property in question.

STATEMENT OF THE CASE

A detailed statement of the case is set out in the motion to deny or affirm the appeal of Lake Lawrence, Inc. in the companion case. Errors in the Department's statement are noted in connection with the argument below.

REASONS FOR DENYING THE WRIT

The petition proceeds from an erroneous premise. When the facts are properly stated, it is clear that the court below fully considered

the property issues raised by the State, including the taking issue, and issued a decision fully consistent with decisions of this Court.

A. The Questions Raised by the State are Premature and Hypothetical.

In its petition, the Department claims the decision below should be revised by this Court because the lower court allegedly ruled:

> that the imposition of the restriction upon use in question could not be challenged by the Department of Natural Resources because " . . . there can be no unconstitutional taking when the property taken is public and not private." (92 Wn.2d at 668)

Petitioners' Brief at p. 7.

In fact, the court below stated:

> As a preliminary matter, the Commissioners [appellant Thurston County below] raise the question whether the taking provisions apply in this case, since the property at issue is owned by the state. Under the rule of Moses Lake School Dist. 161 v. Big Bend Community College, 81 Wash. 2d 551, 503 P.2d 86 (1972) there can be no unconstitutional taking when the property taken is public and not private. While this rule may preclude respondent Department of Natural Resources from complaining, Lake Lawrence, Inc., as lessee of the land, has a private real

> property interest which entitles it to raise the question whether its leasehold has been taken for public use without compensation.

Department of National Resources v. Thurston County, supra, at 668, 601 P.2d at 500; Pet. App. A-13.

The court below did not rule that the permit denial "could not be challenged by the Department" as alleged in the Department's petition. The court below did not have to reach the question of whether the Department was barred because of the presence of a proper party, a lessee, to raise the taking issue.

This Court has ruled that it is improper to pass on constitutional issues that are prematurely raised or that grow out of a mere potential impairment of constitutional rights. Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 70-81.

The language of the court below held open the door for the Department to argue in a later case that trust properties are not subject to the public property rule in Moses Lake v. Big Bend, supra. Since the issue of the Department's status as a trustee was not required to decide the case below, no present case or controversy exists on the point for this Court to resolve by certiorari. Any action by this Court at this time would be analagous to rendering an advisory opinion or declaratory judgment upon a hypothetical case. See, Watson v. Buck, 313 U.S. 387, 402.

B. Petitioner Failed to Take Advantage of Opportunities Below to Present Evidence on the Taking Issue.

The Department also argues that it should be afforded a trial on the issue of whether the land use restrictions constituted a "taking" of property without compensation, and that the failure of the State Supreme Court to grant a remand to the trial court for consideration of the taking question has violated federally secured rights of petitioners. Petitioners' Brief at p. 8.

Under Washington law, petitioner had at least three opportunities to present evidence on the taking issue and did not do so. Under such circumstances, petitioner cannot now complain that it was denied a trial on the issue.

1. Public Hearings on the Proposal.

Counsel for the Department was present at the hearings on the proposal on reconsideration before the County Commissioners. Counsel discussed at length the merits of the applicant's proposal. Counsel argued that the denial might effect a taking, but at no time did counsel for the Department or any witnesses called by it, present any facts to show that denial of the configuration requested by the applicant would render any development of the property economically unfeasible.

2. The Writ of Review.

The denial of the plat is initially reviewed on the record by a trial judge under the state's statutory writ of review process. Wash. Rev. Code § 58.17.180.

In their initial pleadings to the trial court, the Department argued that the action of the

County Commissioners was unlawful, that is contrary to state or federal law, in part because the decision constituted a taking of private property without just compensation.

The Department had a right under state law, Wash. Rev. Code § 7.16.090, to submit a bill of particulars as to facts not evident from the administrative record.

Washington courts have approved the use of trials to present facts to a reviewing court outside the record made before an agency where the matters alleged pertain to the jurisdiction or lawfulness of the conduct of any agency. See e.g., City of Bellevue v. Boundary Review Board, 90 Wash. 2d 856, 586 P.2d 470 (1978).

The Department filed no bill of particulars and requested no trial on the taking issues alleged in the case. In fact counsel stipulated that only three issues of law were to be decided by the court.

The parties hereto do stipulate as follows:

> 1. The parties agree there is one issue of law for the Court to consider; that is whether Respondents, on April 24, 1978 and thereafter, had constitutional and legislative authority to do the following:
>
> (a) Hold new public hearings on the approval or disapproval of the preliminary plat and hear new evidence on the same factual issues (e.g. eagle

habitat) having already been presented to the Shoreline Hearings Board;

(b) Make a decision on the record before the Shoreline Hearings Board and the evidence at new public hearings contrary to and in conflict with the prior Shoreline Hearings Board judgment on the same matter;

(c) Enter Findings of Fact, Conclusions of Law, and Judgment contrary to and in conflict with the Shoreline Hearings Board judgment of March 23, 1978.

Respondents' Stipulation and Order on Issues Under Review at p. 1 (Thurston County Superior Court Cause No. 58623), (see, Lake Lawrence, Inc. v. Thurston County, U.S. Supreme Court No. 79-1880 App. to Jurisdictional Statement at p. A-108.)

After the hearing in which the case was submitted on the record and the stipulation, the trial judge ruled in petitioners favor only to be overturned by the Supreme Court on all three questions.

The Department implies that the issue of right to trial on the taking issue was reserved in the stipulation upon which this matter was decided. (See Petitioners' Brief at p. 5) The implication is a misstatement as to the stipulation. Only the issue of liability and the amount of damages were reserved for future determination.

> 3. If the answer to the issue posed in item one (1) above is in the negative (that is the Board of County Commissioners is found without constitutional and legislative authority to make the decision it did), then the matter of damages of the Petitioner will be scheduled for a separate hearing before the Court, without prejudice to any defense, legal or equitable, which may be raised by Respondents herein.

Respondents' Stipulation and Order on Issues Under Review at p. 2 (Thurston County Superior Court Cause No. 58623), (see, Lake Lawrence Inc. v. Thurston County, U.S. Supreme Court No. 79-1880 App. to Jurisdictional Statement at p. A-109.)

The taking issue was an issue going to the merits of the lawfulness issue under Wash. Rev. Code § 58.17.180 and was therefore properly the subject of a trial if deemed appropriate by counsel under Wash. Rev. Code § 7.16.090. Counsel elected to proceed without such a trial.

3. The Mandamus Petition.

When the County Commissioners denied the preliminary plat for the second time, the Department filed for writ of mandamus to force issuance of the plat alleging, in part, that failure to do so would constitute a taking of the Department's property.

The allegation as to the taking issue was a portion of the gravamen of the Department's complaint in connection with the writ of mandamus. The County duly denied the facts alleged in the complaint.

In Washington courts, a mandamus proceeding is a civil action and proceeds with all of the elements of a civil action including a trial before the court on any issues of fact. Wash. Rev. Code § 7.16.160; see, State ex rel. Close v. Meehan, 49 Wash. 2d 426, 302 P.2d 144 (1956). At trial the Department elected to call no witnesses and requested judgment on the pleadings. Again, the Department had ample opportunity to call witnesses on the taking issue, or other issues raised in its complaint, and elected not to do so.

In summary, the Department had at least three opportunities to call witnesses on the taking issue and elected not to do so. The Department cannot now seek to have this Court direct a trial which by its own choice it elected not to pursue on an earlier opportunity.

C. The Decision Below is Consistent With Decisions of This Court on the Taking Issue.

This Court has recently had several opportunities to comment on the taking issue in the context of land use decisions, Agins v. City of Tiburon, 40 CCH S. Ct. Bull. p. B2864 (No. 79-602 June 10, 1980); Kaiser-Aetna v. United States, 444 U.S. 164; and Penn Central Transportation Co. v. City of New York, 438 U.S. 104.

Taking cases necessarily involve a weighing of private and public interests and revolve on a case-by-case basis on the resolution of three essential factors.

a. The nature or importance of the public interest being protected. Agins v. City of

Tiburon, supra, at B2869; Penn Central Transportation Co. v. City of New York, supra, at 124.

b. Whether there was any public intrusion or uniquely public function served by the action. United States v. Causby, 328 U.S. 256.

c. Whether the regulation permits any economically reasonable use of the property or destroys all reasonable expectations of use. Agins v. City of Tiburon, supra, at B2869-70; Penn Central Transportation Co. v. City of New York, supra, at 124-25.

This Court has long said that land use regulations or actions which accomplish a valid public purpose, while leaving a reasonable economic use of the property to the owner do not constitute an unlawful taking even when such decisions are based on environmental or aesthetic grounds. Agins v. City of Tiburon, supra, at B2870; Penn Central Transportation Co. v. City of New York, supra at 129.

The court below followed the decisions of this Court in deciding that the actions of the County Commissioners, in denying the preliminary plat, did not constitute a taking of property.

The court below noted that in deciding such cases, the determination of whether the regulation is an unconstitutional taking,

> requires a balancing of the nature of the infringement of the private property interests against the public interest in imposing the regulation in question. . . . (Citation omitted)

Department of Natural Resources v. Thurston County, supra, at 668, 601 P.2d at 500; Pet. App. at A-13.

Specifically, the court below: (1) Recognized the need to balance the nature of the infringement of private property interests against the public interest in purposing the regulation in question; (2) Found that the denial specifically left open the possibility of less dense or alternative configuration, and that the record did not support a conclusion that there was no present possible and reasonably profitable alternative uses to which the property is adaptable; and, (3) Found that there was no physical intrusion or damage created by the regulation, no public project enhanced, and no public use of the land created. See, Department of Natural Resources v. Thurston County, supra, at 668-69, 601 P.2d at 500-501; Pet. App. at A-13-14.

In denying the taking claims, the court below said:

> The strong public policy interest being advanced by this regulation of respondent's use of the leasehold is the preservation of a valuable environmental resource which is identified as such in the County's Master Program. Where, as here, the Commissioners' decision does not deny to respondent all reasonably profitable uses, but only requires that the use be adapted to protect an important environmental resource, we find no taking in violation of the state and federal constitutions.

Department of Natural Resources v. Thurston County, supra, at 670, 601 P.2d at 501; Pet. App. at p. A-15.

The standards and factual criteria used by the court below in support of its decision are consistent with the decisions of this Court.

CONCLUSION

The errors complained of in the petition are based upon hypothetical questions which had no effect on the outcome of either the case below or any future cases. The issues decided by the court below were decided in accordance with the decisions of this Court. The petition raises no substantial federal question under 28 U.S.C. § 1257(3) and should be denied.

DATED this 30th day of June, 1980.

Respectfully submitted,

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Certificate of Service

Alexander W. Mackie, duly admitted and qualified as an attorney and counselor of the Supreme Court of the United States, hereby certifies in compliance with Rule 33(b) that he has caused to be served on all parties required to be served herein on June 30, 1980, three copies of the Brief of Respondent in Opposition by placing the same in an envelope, addressed as below set forth, and by depositing the same in the Post Office of the City of Olympia,

Thurston County, Washington, postage prepaid thereon, to-wit:

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